

Lai Poh Choo v Yap Suet Lay & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S6-25-192 OF 1988
MOHD SAARI J
6 JULY 1999

Civil Procedure — Trial — Examination of witness abroad — Whether witness was necessary and material to defence's case — Delay in making application — Heavy burden on party who wishes to examine witness — Failure to name country in which deposition is to be recorded — Exact overseas address of witness is unknown — Whether application should be granted — Rules of the High Court 1980 O 39 rr 1(1), 2(1)(a) & (b)

The defendants/applicants applied for an order to examine one Michelle Yeoh — now residing in the United States — on oath before a judge or registrar or a member of the judiciary of the country in which she is residing or by a special examiner, in accordance with O 39 rr 1(1), 2(1)(a) and (b) of the Rules of the High Court 1980 ('the RHC') respectively.

Held, dismissing the application with costs:

- (1) There was no evidence whatsoever to show why the witness was necessary and material to the defence's case. In the absence of such evidence, the defendant could not invoke O 39 (see p 382A-B).
- (2) The defendants have been unreasonably dilatory in making the present application. If the defendants are serious enough in calling the witness, the application should have been made at the time of hearing the summons for directions under O 25 of the RHC. This was not done (see p 382D-E).
- (3) A heavy burden lies on the party who wishes to examine a witness abroad. In the present case, there was no sufficient evidence to satisfy the court that the witness cannot be brought here or will not come here (see p 382E). Another flaw in the application was that the defendants failed to name the country in which the deposition of the witness is to be recorded. Furthermore, since the exact overseas address of the witness is unknown, the purported order, if granted, will be an exercise in futility as the foreign court will not be able to enforce the attendance of the witness (see p 382F-G).

[Bahasa Malaysia summary]

Defendan-defendan/pemohon-pemohon memohon untuk suatu perintah untuk menyoal Michelle Yeoh — kini bermastautin di Amerika Syarikat — atas sumpah di hadapan seorang hakim atau pendaftar atau ahli badan kehakiman negara di mana beliau bermastautin atau oleh seorang pemeriksa khas, menurut dengan A 39 kk 1(1), 2(1)(a) dan (b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') masing-masing.

- A** **Diputuskan**, menolak permohonan dengan kos:
- (1) Tiada terdapatnya keterangan apa-apa pun untuk menunjukkan mengapa saksi tersebut adalah perlu dan material kepada kes pembelaan. Atas ketiadaan keterangan sedemikian, defendan tidak boleh menggunakan A 39 (lihat ms 382A-B).
- B** (2) Defendan-defendan telah berlengah-lengah secara tidak munasabah di dalam membuat permohonan ini. Jika defendan-defendan cukup serius di dalam memanggil saksi tersebut, permohonan tersebut seharusnya dibuat pada masa pembicaraan saman untuk arahan di bawah A 25 KMT. Ini tidak dibuat (lihat ms 382D-E).
- C** (3) Beban yang berat terletak pada pihak yang ingin memeriksa seorang saksi di luar negara. Di dalam kes kini, tidak terdapat keterangan mencukupi untuk menyakinkan mahkamah bahawa saksi tersebut tidak dapat dibawa ke sini atau tidak akan datang ke sini (lihat ms 382E). Suatu lagi kecacatan di dalam permohonan tersebut adalah bahawa defendan-defendan gagal untuk menamakan negara di mana deposisi saksi tersebut akan direkodkan. Tambahan lagi, memandangkan alamat tepat luar negara saksi tersebut tidak diketahui, perintah tersebut akan merupakan suatu pelaksanaan sia-sia memandangkan mahkamah asing tidak akan dapat menguatkuasakan kehadiran saksi tersebut (lihat ms 382F-G).]
- D**
- E**

Cases referred to

Ehrmann v Ehrmann [1896] 2 Ch 611 (refd)

Lawson v Vacuum Brake Co (1884) 27 Ch D 137 (refd)

F *Steuart v Gladstone* (1877) 7 Ch D 394 (refd)

Anthony Kuan (SM Kam & Associates) for the applicants/defendants.

KH Yeap (Koh & Associates) for the respondent/plaintiff.

Mohd Saari J: In this summons-in-chambers ('encl 53'), the defendants/applicants apply for the following relief:

- G** (a) kebenaran mahkamah bagi defendan-defendan untuk satu permohonan bagi pemeriksaan Cik Michelle Yeoh atas sumpah di hadapan seorang hakim atau pendaftar berikutan A 39 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT);
- H** (b) selanjutnya atau secara alternatif, kebenaran mahkamah bagi defendan-defendan untuk perintah bagi pengeluaran surat permintaan kepada pihak-pihak berkuasa kehakiman negara di mana orang itu hendak ambilkan atau menyebabkan diambil, keterangan Cik Michelle Yeoh berikutan A 39 k 2(1)(a) KMT;
- I** (c) selanjutnya atau secara alternatif, kebenaran mahkamah bagi defendan-defendan untuk satu perintah untuk melantik seorang pemeriksa khas untuk mengambil keterangan Cik Michelle Yeoh di negara itu berikutan A 39 k 2(1)(b) KMT; and

(d) bahawa kos permohonan ini di dalam kos dalam kausa.

In supporting affidavit filed by the defendants (encl 52), it was stated that the witness named Cik Michelle Yeoh Choo Kheng, now residing in Hollywood US was busy filming in US and/or Hong Kong.

In this proceeding, there is no evidence whatsoever to show why the witness is necessary and material to the defence's case. In the absence of such evidence, I do not see how the defendant could invoke O 39. As stated by Lopes LJ in *Ehrmann v Ehrmann* [1896] 2 Ch 611 at p 616:

In my opinion, a commission to examine witnesses ought not to be lightly issued. I think that in order to justify the issue of a commission, it ought to be clearly made out that the evidence abroad which it is sought to obtain is material, and directly material, to the case in hand — not merely evidence which incidentally might be useful, ...

On this ground alone, the present application must fail.

The hearing of main suit was commenced by Mohd Noor J on 2 December 1997. Since then, series of postponement was granted. At the stage of the defence's case, I fixed 17 June 1999 as final date of hearing for continuation of defence's case. The present application (encl 53) was filed on 12 February 1999. I take the view that if the defendants are serious enough in calling the witness, the application should have been made at the time of hearing the summons for directions under O 25 of the RHC. It appears to me that the defendants have been unreasonably dilatory in making the present application (see *Steuart v Gladstone* (1877) 7 Ch D 394).

In *Lawson v Vacuum Brake Co* (1884) 27 Ch D 137, it is said that a heavy burden lies on the party who wishes to examine witness abroad. As to the present case, there is no sufficient evidence to satisfy this court that the witness cannot be brought here or will not come here. From the court file (encl 39), the witness's address is given as 138 Jalan Gopeng, Ipoh, Perak.

Another flaw in the present application is that the defendants fail to name the country in which the deposition of the witness is to be recorded.

Looking from another perspective, since the exact overseas address of the witness is unknown, the purported order, if granted, will be an exercise in futility as the foreign court will not be able to enforce the attendance of the witness. As to the affidavit evidence of the defendants, at best, it is sketchy.

In the premise and for reasons stated above, the application is dismissed with cost.

Application dismissed with cost.

Reported by Loo Lai Mee

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